FRAUD FACTS

DEPUTY GENERAL COUNSEL (ACQUISITION) ***No. 7, June 1999***

This is the seventh edition of ***FRAUD FACTS***, a biannual newsletter from the Air Force Deputy General Counsel (Acquisition) (SAF/GCQ). The purpose of this newsletter is to provide information and feedback to Acquisition Fraud Counsel (AFC) at all levels concerning the ongoing operation of the Air Force's Procurement Fraud Remedies Program.

FRAUD FIGHTER PROMOTED TO GENERAL

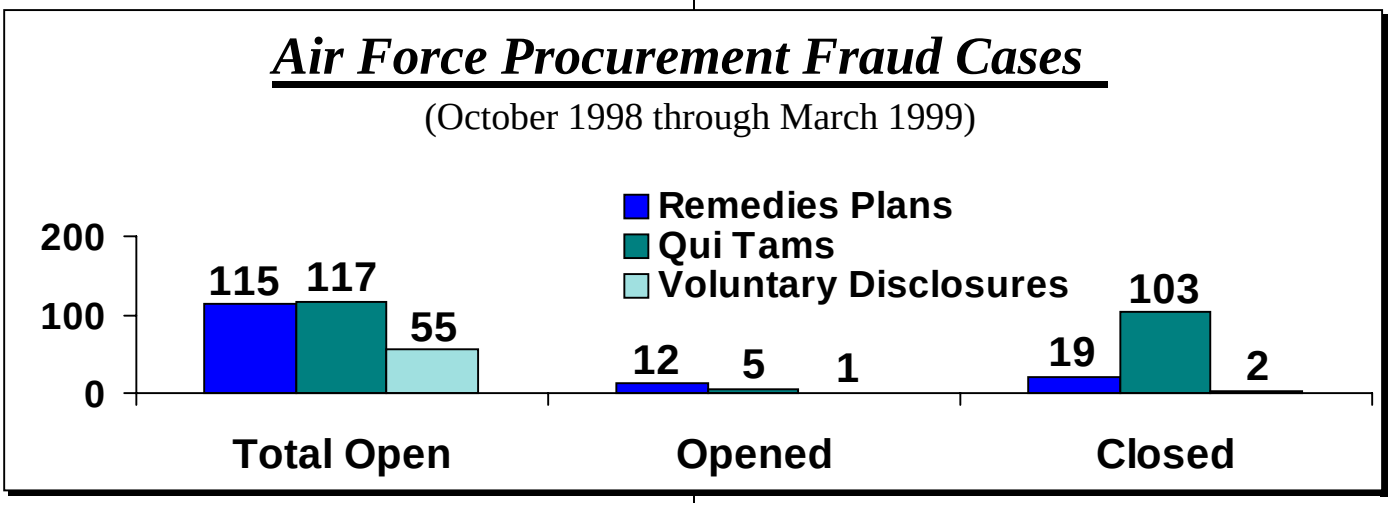
In the first edition of ***FRAUD FACTS*** (April 1996), we labeled as a "must read" an article by then-Colonel Jerald Stubbs: Fighting Fraud Illustrated: The Robins AFB Case, 38 A.F. Law Rev. 141 (1994). We are pleased to note that Colonel Stubbs is now Brigadier General Stubbs, effective 1 April 1999, and the Staff Judge Judge Advocate, AFMC. We still encourage all Acquisition Fraud Counsel (AFC) to read this excellent article.

HOUSE CLEANING!

Every once in a while, one needs to clean out the garage, and SAF/GCQ is no exception. As you can see in the charts below, we closed out over a hundred *qui tam* cases that had been in our database. Most of this action was due to the efforts of Rick Sofield during his final weeks in the office. He requested a Department of Justice (DoJ) status report on all of the *qui tam* cases that the Air Force is monitoring. Not surprisingly, many of the cases that were declined years before had later been dismissed. Unfortunately, since we do not often receive a declination notice nor the later dismissal, many of these dismissed cases remained technically open in our database. Rick was able to clear out a lot of this dead wood by checking all of our open cases against DoJ's report and closing those which had been dismissed or otherwise resolved after declination. In the future, we are going to follow up with DOJ on a more regular basis to find out if cases have been dismissed.

REMEDIES PLANS FOR ALL QUI TAMs

Until recently, we did not require remedies plans for qui tam cases. Unfortunately, we experienced problems providing recommendations to DOJ in some cases because there was no AFC actively working the case to provide input on the decision. As a result, we are now requiring remedies plans for all qui tams. Since all qui tam cases ultimately require a recommendation from the Air Force to DoJ, we will be assured of having an AFC who is involved in each case prior to the intervention deadline. This will allow the AFC to play an active role with the Assistant U.S. Attorneys (AUSAs) in the litigation, including any settlement discussions.



Even if a case is declined, we will leave the remedies plan open to monitor the status of the case through letter updates from the assigned AFC. This way we will be aware of which relators are pursuing cases on their own and be better prepared for the accompanying demands (typically, discovery) on Air Force resources.

While this could increase the number of remedies plans an AFC is working, many of the updates will require only simple letter updates. We don't anticipate that this new policy will add significantly to an AFC's workload. Most importantly, this policy will assure timely Air Force involvement at all stages of the qui tam process.

THE REMEDIES PLAN: NOT THE TAIL WAGGING THE DOG

One of the tasks levied upon the heads of DoD Components is to establish procedures to ensure that all proper and effective remedies, when found applicable and appropriate, are considered and undertaken promptly. DoD Dir. 7050.5, ¶ E1e. In furtherance of this tasking, AFI 51-1101, 1.1.6.1, requires the installation SJA to "[a]dminister the installation procurement fraud remedies program and may appoint one or more AFCs to assist in fulfilling this responsibility." As we said in our inaugural edition: "The most important element in the coordination of procurement fraud remedies program is the AFC. The success of the program depends on the AFC working closely with investigators, contracting and technical personnel, the Justice Department and others to ensure all appropriate remedies are pursue."

As you can see, AFCs are in the business of pursuing remedies. While DoD Dir. 7050.5 (¶ E1f) also requires the preparation of remedies plans, this is only a secondary effort. We recognize that the preparation of a remedies plan, by any other name, would probably still be a pain in the neck. But we pursue remedies because we are supposed to ferret out fraud and not because we have to prepare a remedies plan. In short, pursuing remedies in a particular case is a continual -- not a once-every-six-months -- activity.

FRAUD RECOVERY WITHOUT GOVERNMENT LOSS

The Air Force doesn't have to lose money in order to pursue a civil fraud case against a contractor. Section 604 of the Contract Disputes Act (CDA) provides the Government with a civil remedy in cases where a contractor fraudulently claims more than the amount to which he is entitled. Unlike the civil False Claims Act, 31 U.S.C. §§ 3729 - 3733, the Government can recover even if the contractor has not actually received the amount it fraudulently claimed.

A violation of § 604 requires that: (1) the contractor is unable to support any part of its claim and (2) such inability is attributable to misrepresentation of fact or fraud on the part of the contractor. 41 U.S.C. § 604. A contractor that violates § 604 is liable to the Government for the amount by which it fraudulently overstated its claim and the costs to the Government attributable to reviewing the fraudulent part of the claim. Section 604 was enacted to prevent contractors from "horsetrading," a practice in which "an amount beyond that which can be legitimately claimed is submitted as a negotiating tactic." S. Rep. No. 1118, 95th Cong., 2d Sess. 20 (1978).

The Air Force recently settled a CDA § 604 fraud case with Evergreen International Airlines. In 1992, Evergreen filed three requests for equitable adjustment (REAs) under its Civil Reserve Airlift Fleet (CRAF) contract with the Air Force. The REAs were not supported by adequate documentation and included items which had not appeared in any of the REAs submitted by other CRAF participants. In September 1992, DCAA completed an audit and recommended a fraud investigation of Evergreen for false claims.

Following a lengthy AFOSI investigation and a criminal declination by the U.S. Attorney's Office in Portland, Oregon, the Air Force requested that the DoJ consider pursuing a civil case under CDA § 604. DoJ agreed, and the fraud case eventually settled for $1.25M. The Air Force's contracting officer determined, based upon a new accounting by

Evergreen, that the company was entitled to approximately $5M for its extra costs of performing the contract. As a result, the Air Force paid Evergreen $3.75M.

This case was a triumph for the Air Force Fraud Remedies Program. Through the diligent efforts of Acquisition Fraud Counsels MAJ Lauren Johnson-Naumann and MAJ Jeffrey Watson working in close coordination with Assistant U.S. Attorney Neil Evans, the Government not only protected itself against paying a contractor's overstated claim but forced the contractor to concede money back to the Government.

Remember, simply because the Government hasn't lost any money doesn't mean there is no civil remedy. If you have a case that you think DoJ should pursue under CDA § 604, contact SAF/GCQ and we will get DoJ's Civil Division to take a look.

OSI REPORTS: KEY SOURCE OF INFORMATION

All too often remedies plan updates are limited to the comment "No new information received during this reporting period." This does not necessarily mean that no significant activity took place during the period, just that the AFC is not "in the loop." The key to getting in the loop is receiving timely case status reports (CSR) from the case agent.

AFOSI is aware of its obligation to provide CSRs to the AFC at the concerned installation for each procurement fraud case, whether there is an open remedies plan or not. *See AFI 51-1101, para. 1.1.8.* The reason that some reports do not get to the AFC is not due to unwillingness on the part of OSI special agents. Simply put, they suffer from lack of information, too. The problem is that it is difficult to determine what base qualifies as the "concerned installation" for many contracts. In short, the special agent does not know who the AFC is or where to send the CSR.

The best way around this problem is for the AFC to make him or herself known to the special agent. Once an initial CSR is received, let the agent know that you are the point of contact. If you have not received an updated CSR for a case in some time, call the agent to check the status. Help make both your jobs easier by identifying yourself and following up to get the most current information possible.

DEBARMENT & SUSPENSION NOTES by SAF/GCR

Opening our space in this edition of Fraud Facts, we want to showcase a troubling conviction involving Langley Air Force Base's Simplified Acquisition of Base Engineering Requirements (SABER) program.

On March 22, 1999, in the U.S. DistrictCourt for the Eastern District of Virginia, Karl Kruse pleaded guilty to one count of providing kickbacks and one count of providing gratuities to the SABER contracting officer. The facts supporting Kruse's guilty plea illustrate a systemic weakness that may exist in other Air Force SABER programs.

Kruse was a general partner in Eastern Electric Company (EEC) and, from 1992 to 1997, was also employed at Systems Engineering & Energy Management Associates (SEEMA) as their SABER Project Manager. As project manager, Kruse directed subcontracts to his company for all of the electrical work performed at Langley AFB under SEEMA's SABER contract. In order to obtain and keep his sole source arrangement, Kruse paid the president of SEEMA over $750,000 in cash and "loans." Kruse also allegedly kept the chief of SABER contracts "happy" with several gratuities, including the installation of three air conditioning units, a Jet Ski, and a trailer. Kruse recovered the cost of these gratuities and kickbacks by inflating invoices that EEC sent to SEEMA for payment. These invoices were ultimately paid by Langley AFB.

The central characteristic of SABER contracts is a single contractor performs the repetitious base engineering requirements. Although the installation achieves efficiency, it loses critical oversight

capabilities and must rely for its protection on the SABER contractor's ethical conduct.

The "fraud indicator" in this case was the fact that, during SEEMA's tenure as the Langley SABER contractor, only one electrical contractor, EEC, performed all of the SABER electrical work. It was obvious that, for whatever reason, SEEMA was not competing its subcontracts for the SABER electrical work. It was equally obvious that this indicator was not examined until after SEEMA lost the SABER contract.

Fact-Based D/S Actions

Steven A. Shaw is the Air Force Debarment and Suspension Authority. From the day he assumed his duties, Mr. Shaw has promoted prompt, fact-based debarments and suspensions as the Air Force's frontline defense against unscrupulous and incompetent contractors. Mostly recently, Mr. Shaw presented this message at the DCIS SAC Conference in San Antonio and in the lead article published in the March 1999 edition of the Air Force JAG periodical, The Reporter. Mr. Shaw believes that debarment and suspension should always be the first consideration in any remedies plan. To that end, GCR reviews all cases brought to its attention and, if appropriate, will debar or suspend the contractor, no matter what other remedies, if any, are being pursued.

This last point raises the issue of what constitutes "appropriate." Unlike U.S. Attorneys' Offices and remedies plan requirements, GCR has no threshold prerequisite for admission - no minimum loss, no special case types. All that is required is evidence of contractor misconduct that establishes a "cause of so serious or compelling a nature that it affects" that contractor's present responsibility. See FAR 9.406-2(c) and 9.407-2(c). Cognizant AFCs should insure that all appropriate cases are referred to GCR, even when -- especially when -- the misconduct does not result in a loss and does not constitute a criminal violation adequate for a U.S. Attorney to pursue.

Don't wait for OSI to deliver a case report or to provide the initial alert. "Appropriate" facts are not always found in investigative reports or government audits. AFCs should keep their eyes open. Other sources of "appropriate" facts include the following:

a. Local newspaper reports of convictions - even those unrelated to Government contracting;
b. Contracting officer determinations and findings (D & F) supporting terminations for default;
c. Terminations for default that are converted to terminations for convenience;
d. D & Fs that document adverse responsibility determinations by local contracting officers on individual contract actions; and
e. State debarment actions.

State debarments are frequently listed on the Internet and can be found at a standardized URL, such as **www.state.__.us**. Fill in the blank with the appropriate state postal code. For example, the New Jersey list of debarred contractors is found at www.state.nj.us.

AFCs, as much as criminal investigators, are the "eyes and ears" for the Air Force fraud remedies program. Their routine contact with contracting officials makes them a key early warning structure essential to the defense of the Air Force acquisition system. So, stay alert and send us the cases you find.

WHO'S WHO @ SAF/GCQ

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